85-655

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM TEMPLEMAN,

Petitioner,

v.

CHRIS CRAFT CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PATRICK J. MAZZA*
ARTHUR L. KLEIN
ARNSTEIN, GLUCK, LEHR,
BARRON & MILLIGAN
7500 Sears Tower
Chicago, Illinois 60606
(312) 876-7100

Counsel for Petitioner.
** Counsel of Record*

ARNSTEIN, GLUCK, LEHR,
BARRON & MILLIGAN
7500 Sears Tower
Chicago, Illinois 60606
(312) 876-7100
Of Counsel.

Pandick Midwest, Inc., Chicago • 733-6000

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QUESTION PRESENTED

Did the First Circuit incorrectly rule, contrary to other circuits, that the United States Magistrates Act, 28 U.S.C. § 636(b)(1)(C)(1982), requires objections to a magistrate's proposed findings and recommendations in order to preserve the right to seek review of the conclusions of law contained in the magistrate's report?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIAM TEMPLEMAN,

Petitioner,

v.

CHRIS CRAFT CORPORATION,

Respondent.

PETITION OF WILLIAM TEMPLEMAN FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

Petitioner respectfully requests that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the First Circuit, entered on August 16, 1985. The First Circuit affirmed a decision of the United States District Court for the District of Puerto Rico denying prejudgment interest in favor of Petitioner on the ground that Petitioner had waived the right to raise the claim on appeal by failing to object to conclusions of law in a magistrate's report.

OPINION BELOW

The opinion of the Court of Appeals for the First Circuit is not yet officially reported. It is reprinted in the appendix to this petition, commencing at page 2a. The order of the District Court adopting the Magistrate's report (appendix, p.12a) and the recommendations of the Magistrate (appendix, p. 13a) are not reported.

JURISDICTIONAL STATEMENT

Judgment was entered by the Court of Appeals for the First Circuit on August 16, 1985 (appendix, p. 2a). This Court has jurisdiction to review that judgment pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

This case concerns the intended scope of the United States Magistrates Act, specifically 28 U.S.C. § 636(b)(1)(C)(1982), which provides, in relevant part:

> (C) The magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties. Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

This statute is set forth in its entirety at Appendix, p. 15a.

STATEMENT OF THE CASE

This petition arises from the District Court's refusal to award prejudgment interest to the Petitioner,[1] William Templeman, and the Circuit Court's refusal to review that order. Petitioner commenced this action on November 8, 1974 seeking damages for personal injuries, property damage, and other losses stemming from the sinking of his boat. The vessel was manufactured by Respondent Chris Craft and Petitioner alleged, in a multi-count complaint,[2] several theories of recovery including strict product liability, negligence and breach of express and implied warranties.

Due to the intermixture of tort and contract claims and because the vessel had sunk on the high seas, the District Court had to determine the substantive law under which the case would be decided. The District Court designated a Magistrate to make a recommendation as to the choice of law. On January 27, 1984, the Magistrate filed proposed findings and recommendations which stated, *inter alia,* " that the substantive law applicable to this case should be general admiralty law including its choice of law rules." Appendix, p.13a. On March 21, 1984, the District Court adopted the Magistrate's report and recommendation in full. Appendix, p. 12a.

The trial commenced on August 27, 1984, before a jury. At the close of trial, the jury returned a verdict in favor of

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[1] As required by Rule 21.1(b) of this Court, the parties to the proceeding in the United States Court of Appeals for the First Circuit were William Templeman and Alyce Templeman, plaintiffs, and Chris Craft Corporation, defendant.

[2] The complaint sought recovery on the following theories: negligent design and manufacture of the boat (Count I); breach of express warranty (Count II); strict products liability (Count III); breach of implied warranty of fitness for purpose (Count IV); negligent repair (Count V); and sale of an unworthy sea vessel (Count VI). In addition, a seventh court was brought by Illinois National Insurance Company for subrogation of the amount it had paid the Petitioner for the loss of the boat.

Petitioner as to all of his claims and awarded $238,293.00 in damages. On September 11, 1984, the District Court entered judgment on the jury's verdict.

On September 20, 1984, pursuant to Federal Rule of Civil Procedure 59(e), Petitioner moved for an award of pre-judgment interest as mandated by the substantive law of Michigan, the place of delivery of the vessel. On December 4, 1984, the District Court denied that motion and the Court of Appeals for the First Circuit affirmed that ruling.[3]

In its decision, the First Circuit did not reach the merits of Petitioner's arguments. Rather, the Court held that "[t]he failure of plaintiffs [petitioner] to object to the magistrate's report and recommendation is a complete bar to appellate review of their claim that Michigan law [relative to pre-judgment interest] is applicable." Appendix, p. 4a.

In reaching this result, the First Circuit relied exclusively upon its own previous decisions. However, Judge Rubin of the Fifth Circuit, sitting by designation in this case, filed a concurring opinion, noting and commenting on the serious split of authority between the circuits on the issue of objections to a Magistrate's report. As Judge Rubin stated in his concurring opinion, the majority holding indicates that "a party's failure to object to a magistrate's recommendations with respect to *both* findings of fact and conclusions of law constitutes a waiver of the right to contest those issues on appeal." Appendix, p. 10a-11a (emphasis added). Judge Rubin stated, however, that the better construction of the statute in question, 28 U.S.C. § 636(b)(1), is the rule followed by those circuits which hold that the waiver rule should only apply to a magistrate's finding of fact, not conclusions of law. Consequently, Judge Rubin stated that, were he not sitting by designation in the First Circuit, he would have reached the merits of the Petitioner's claim to prejudgment interest.

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[3] Petitioner in addition appealed the District Court's order denying attorneys fees and denial of certain costs.

REASONS FOR GRANTING THE PETITION

I.

THE FIRST CIRCUIT'S DECISION CONTRAVENES THE CONGRESSIONAL POLICY UNDERLYING THE ACT

The First Circuit has decided an important issue under the United States Magistrates Act, 28 U.S.C. § 636(b)(1)(C) (1982), in a way which is manifestly inconsistent with the explicit language of that Act, with its legislative history and with the decisions of other circuits. Accordingly, this Court should reverse the judgment below as it relates to the issue of prejudgment interest.

The very language of the statute uses the permissive construction that "any party *may* serve and file written objections." Although the statute "fixes a time limit of ten-days for the filing of objections in the District Court, . . . it does not say that failure to file will destroy the right to appeal . . . that Congress has granted in 28 U.S.C. § 1291." *Lorin Corporation v. Goto & Co., Ltd.*, 700 F.2d 1202, 1206 (8th Cir. 1983).

Furthermore, the legislative history of the Act does not "specifically address[] the potential consequences a party will suffer if he fails to file the written objections authorized . . ." *United States v. Schronce*, 727 F.2d 91, 93 (4th Cir. 1984), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2395, 81 L.Ed.2d 352 (1984). As the Ninth Circuit has held, "[i]t is significant that Congress did not include a waiver provision in the statute." *Britt v. Simi Valley Unified School District*, 708 F.2d 452, 455 (9th Cir. 1983).

In addition, Federal Rule of Civil Procedure 72, which includes language identical to the relevant portions of 28 U.S.C. § 636, and governs magistrate's recommendations and findings, "includes no provision that failure to object will constitute a waiver of appeal." *Id.* at 454; *see also* Fed. R. Civ. P. 72 (appendix, p. 16a). As stated in the Advisory Committee

Notes to Rule 72, "[w]hen no timely objection is filed, the court need only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation." In the face of the Advisory Committee Notes, it is difficult indeed to support the First Circuit's holding here and in *Park Motor Mart, Inc. v. Ford Motor Co.*, 616 F.2d 603 (1st Cir. 1980), where the First Circuit first established the "absolute waiver" rule. Obviously, the drafters of Rule 72 and the Advisory Committee did not contemplate the First Circuit's view that failure to object to a magistrate's report and recommendations should be treated as an absolute waiver of the right to appeal.

As the Eighth Circuit held: "if Congress had wished such a drastic consequence to follow from the missing of the 10-day time limit, it would have said so explicitly." *Lorin Corp. v. Goto & Co., Ltd.*, 700 F.2d 1202, 1206 (8th Cir. 1983). However, it did not say so. Since the First Circuit's decision clearly conflicts with the intent of the drafters of the Magistrates Act, Petitioner asks this Court to issue a writ of certiorari and reverse the decision below.

II.

THE FIRST CIRCUIT'S DECISION IMPROPERLY CONSTRUES THE PERMISSIVE LANGUAGE OF THE STATUTE

Even if the First Circuit's decision did not clearly contravene Congressional policy, it would be improper for the further reason that it conflicts with settled rules of statutory construction mandated by this Court. In *United States v. Rogers*, 461 U.S. 677, 706, 103 S.Ct. 2132, 76 L.Ed. 2d 236 (1983), this Court, after reviewing its previous decisions defining the use of the word "may" in a statute, held:

> The word "may," when used in a statute, usually implies some degree of discretion. This common sense principle of statutory construction is by no means invariable, . . . and can be defeated by indications of legislative intent to the contrary or by obvious inferences from the structure and purpose of the statute. (citations omitted)

This Court has repeatedly held, not only in *Rogers* but in other cases as well, that use of the word "may" implies a substantial degree of discretion. *See Haig v. Agee,* 453 U.S. 280, 294, 101 S.Ct. 2766, 69 L.Ed. 2d 640 n. 26 (1981).

It is also settled that statutes which provide a time limit for action are not mandatory unless the statute additionally specifies a consequence for failure to comply with the time limit. *Thomas v. Barry,* 729 F.2d 1469, 1470 n. 5 (D.C. Cir. 1984). Here, the lack of even a scintilla of a statutory indication as to the consequences of a party's failure to object to a magistrate's report, coupled with the use of the permissive statutory term "may", unquestionably indicates that the Act is not to be given mandatory application.

The First Circuit should have held as Judge Rubin wished to hold, i.e. that lack of an objection within 10-days is not an absolute bar to appeal of the magistrate's conclusions of law. The construction imposed by the First Circuit contradicts previous holdings of this Court as established in *Rogers* and *Haig* and, for this reason too, Petitioner asks this Court to issue a writ of certiorari and reverse the decision below.

III.

THE FIRST CIRCUIT'S DECISION MANIFESTS A CONFLICT BETWEEN THE CIRCUITS

It is not surprising, in view of the foregoing, that the First Circuit's decision conflicts with the law of other circuits. The apparent certainty with which the First Circuit reaches its decision is overshadowed by the fact that the section in issue "is not a model of clarity." *Webb v. Califano,* 468 F.Supp. 825, 827 (E.D. Cal. 1979). Indeed, as Judge Rubin recognized in his concurring opinion, the Circuit Courts of Appeal are irreconcilably split as to the proper construction of the Magistrates Act. It is well settled that this Court grants certiorari "to resolve a

conflict among the Courts of Appeals." *Heckler v. Campbell,* 461 U.S. 458, 464, 103 S.Ct. 1952, 76 L.Ed. 2d 66 (1983); *see e.g., Bell v. United States,* 462 U.S. 356, 358, 103 S.Ct. 2398, 76 L.Ed. 2d 638 (1983); *National Labor Relations Board v. Savair Manufacturing Co.,* 414 U.S. 270, 272, 94 S.Ct. 495, 38 L.Ed. 2d 495 (1973); *Federal Maritime Commission v. Seatrain Lines, Inc.,* 411 U.S. 726, 729, 93 S.Ct. 1773, 36 L.Ed. 2d 620 (1973); *see also,* 12 J. Moore, *Federal Practice* ¶ 711.01 [4.-1] (1982). As recently as last term, in granting certiorari in the case of *Sedima, S.P.R.L. v. Imrex Co.,* ____ U.S. ____, 105 S.Ct. 3275, 3280, 87 L.Ed.2d 346, 352 (1985), this Court looked to "the variety of approaches taken by the lower courts and the importance of the issues." Therefore, this Court should, at the very least, resolve the conflict between the circuits in construing the Magistrates Act.

Judge Rubin believes, as do Petitioners, that the better construction of the Act is reflected by the decisions of those circuits which apply the waiver rule only to a magistrate's findings of fact. While the First Circuit holds[4] that the failure of a party to object to a magistrate's report and recommendations is a *complete* bar to appellate review of *both* findings of fact and conclusions of law, the Fifth, Eighth, Ninth, and Eleventh Circuits all hold to the contrary. These circuits hold that a party's failure to file objections to a Magistrate's report and recommendations does *not* constitute a bar to the right to appeal conclusions of law.

For example, in *Nettles v. Wainwright,* 677 F.2d 404, 410 (5th Cir. 1982) (en banc)(Unit B), the court[5] specifically held that:

> failure of a party to file written objection to proposed findings and recommendations in a magistrate's report,

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[4] *See Hovan v. United Brotherhood of Carpenters & Joiners of America,* 704 F.2d 641, 641-42 (1st Cir. 1983); *Scott v. Schweiker,* 702 F.2d 13, 14 (1st Cir. 1983); *Park Motor Mart, Inc. v. Ford Motor Company,* 616 F.2d 603 (1st Cir. 1980).

[5] This decision was released by Unit B of the then Fifth Circuit and is now considered Eleventh Circuit law. *See Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir. 1982).

> filed pursuant to Title 28 U.S.C. § 636(b)(1), shall bar the party from a *de novo* determination by the district judge of an issue covered in the report and shall bar the party from attacking on appeal *factual findings* accepted or adopted by the district court except upon grounds of plain error or manifest injustice. (emphasis added)

In addition, the recent Fifth Circuit case of *Deloney v. Estelle,* 679 F.2d 372 (5th Cir. 1982), adopted *Nettles* and held that the failure to file written objections is a bar to "attacking on appeal *factual* findings in the report accepted or adopted by the district court." *Id.* at 373 (emphasis added).

In even broader fashion, the Eighth Circuit held in *Lorin Corp. v. Goto & Co., Ltd.,* 700 F.2d 1202 (8th Cir. 1983), that the failure to object to a magistrate's report and recommendation "did not, in the circumstances of this case, operate as a waiver of its right to appeal from the district court." *Id.* at 1207. Similarly, the Ninth Circuit in *Britt v. Simi Valley Unified School District,* 708 F.2d 452, 454 (9th Cir. 1983), relying on *Nettles* and *Lorin,* embraced the statutory construction that failure to object only acts as a waiver as to *factual* issues decided by the magistrate, *not* issues of law.

In this case, the First Circuit refused to consider Petitioner's claim for prejudgment interest under Michigan law, because Petitioner did not object to the conclusions of law made by the magistrate.[6] However, if the First Circuit had applied the majority (and proper) interpretation of the Act, the Court would have at least reached the merits of Petitioner's claim. Its contrary and improper result has, of course, been highly detrimental to Petitioner.

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[6] Petitioner also argued to the First Circuit that the magistrate's conclusion of applicable law—i.e. "general admirality law"—did, in fact, permit the application of Michigan prejudgment interest law. However, the First Circuit did not reach this argument.

CONCLUSION

For each and all of the reasons set forth above, Petitioner respectfully requests this Court issue a Writ of Certiorari and thereafter rule that the judgment of the United States Court of Appeals for the First Circuit be reversed, as it applies to the question of prejudgment interest.

Respectfully submitted,

PATRICK J. MAZZA*
ARTHUR L. KLEIN
ARNSTEIN, GLUCK, LEHR,
BARRON & MILLIGAN
7500 Sears Tower
Chicago, Illinois 60606
(312) 876-7100

Counsel for Petitioner.
** Counsel of Record*

ARNSTEIN, GLUCK, LEHR,
BARRON & MILLIGAN
7500 Sears Tower
Chicago, Illinois 60606
(312) 876-7100
Of Counsel.

APPENDIX

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UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 84-1889

WILLIAM TEMPLEMAN and ALYCE TEMPLEMAN,
Plaintiffs, Appellants,

v.

CHRIS CRAFT CORPORATION,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Raymond L. Acosta, *U.S. District Judge*]

Before
Coffin, Rubin* and Bownes,
Circuit Judges.

Theodore T. Schuld with whom *Patrick J. Mazza, Arthur L. Klein* and *Arnstein, Gluck, Lehr, Barron & Milligan* were on brief for appellants.

Ivan M. Fernandez with whom *Ulpiano Falcon Matos* and *Falcon & Fernandez* were on brief for appellee.

August 16, 1985

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* Of the Fifth Circuit, sitting by designation.

BOWNES, *Circuit Judge.* The issues in this appeal are whether the district court erred in denying plaintiffs' request for prejudgment interest, costs and attorney's fees. Plaintiffs, William and Alyce Templeman, received a jury verdict of $238,293 for personal injuries and property losses resulting from the burning and sinking on the high seas of their yacht which had been manufactured by defendant Chris Craft Corporation.

Prejudgment Interest

Plaintiffs brought suit on the basis of diversity jurisdiction under theories of strict liability, negligence and breach of express and implied warranties. The district court determined that admiralty was the applicable substantive law. Plaintiffs claim that Michigan law, which requires the addition of prejudgment interest in civil actions, should have been used. For the reasons that follow, we find that plaintiffs did not properly raise the issue below and are precluded from doing so now.

In September of 1983, plaintiffs filed a "Petition and Memorandum of Law Seeking Determination of Substantive Law Applicable to This Action." The petition sought the application of Florida substantive law or, in the alternative, Puerto Rico substantive law. The petition also asserted that admiralty law applied. Nowhere in the petition is there any mention that Michigan law applied.

The question of the applicable substantive law was referred by the district court to a magistrate. The magistrate recommended "that the substantive law applicable to this case should be general admiralty law including its choice of law rules." The recommendation does not advert to Michigan law directly or by remote inference. The recommendation of the magistrate was filed on January 27, 1984. Plaintiffs did not object to it. The district court adopted the magistrate's report and recommendation on March 21, 1984.

The case was tried and submitted to the jury on the basis of general admiralty law. The jury was specifically asked, as

required in admiralty, whether the plaintiffs were entitled to prejudgment interest and found that they were not. Plaintiffs now argue that the substantive law of Michigan should govern the question of prejudgment interest. They contend that because a breach of warranty occurred under the contract to build or sell the yacht and this type of contract is not governed by admiralty, the substantive law of the place of delivery, Michigan, should govern the warranty claims and the question of whether to award prejudgment interest. Under Michigan law, prejudgment interest is required by statute. Mich. Comp. Laws Ann. § 600.6013(1), (2) (Supp. 1985).

The failure of plaintiffs to object to the magistrate's report and recommendation is a complete bar to appellate review of their claim that Michigan law is applicable. *Hovan* v. *United Brotherhood of Carpenters and Joiners of America*, 704 F.2d 641, 641-42 (1st Cir. 1983); *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *Park Motor Mart, Inc.* v. *Ford Motor Company*, 616 F.2d 603 (1st Cir. 1980). Absent objection by the plaintiffs, the district court had a right to assume that plaintiffs agreed to the magistrate's recommendation. General admiralty law, therefore, became the law of the case.

Although plaintiffs in their trial brief did suggest that Michigan's or Wisconsin's rules on prejudgment interest applied, we do not think that this rose to the level of an objection to the magistrate's report and, even if it did, it was not made within the ten-day statutory period.[1] The trial brief was filed on

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[1] The Federal Magistrate's Act, 28 U.S.C. § 636, provides in pertinent part:

> (C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court.

August 24, 1984. seven months after the magistrate's report and five months after the district court adopted the report. Nor did the plaintiffs object to the court's submitting the case to the jury on an admiralty prejudgment interest instruction and special interrogatory. A party may not appeal from an error to which he contributed by failing to object. *Austin* v. *Unarco Industries, Inc.*, 705 F.2d 1, 15 (lst Cir.), *cert. denied*, 104 S. Ct. 34 (1983).

Taking these omissions into consideration, we think it clear that plaintiffs did not properly raise the issue of the applicability of Michigan prejudgment interest law below. They are, therefore, precluded from doing so on appeal. *Brooks Village North Associates* v. *General Electric Company*, 686 F.2d 66, 76 (lst Cir. 1982). We have repeatedly held that, in the absence of a miscarriage of justice, we will not consider a legal theory or contention not presented to the trial court and raised for the first time on appeal. *Computer Systems Engineering, Inc.* v. *Qantel Corporation*, 740 F.2d 59, 64 (lst Cir. 1984); *Johnson* v. *Allyn & Bacon, Inc.*, 731 F.2d 64, 73 (lst Cir.) (listing cases), *cert. denied*, 105 S. Ct. 433 (1984); *Marcial Ucin, S.A.* v. *SS Galicia*, 723 F.2d 994, 1002 (lst Cir. 1983); *Johnston* v. *Holiday Inns, Inc.*, 595 F.2d 890, 894 (lst Cir. 1979).

Costs

Following the jury verdict in their favor, the plaintiffs submitted a bill of costs in the amount of $24,300 for expenses they had incurred in the litigation. The district court entered an order allowing $1,136.33 plus the actual air fare paid by the plaintiffs' expert witness as costs taxable to Chris Craft. The question is whether the district court erred in denying plaintiffs' requests for deposition costs, docket fees, and expert witness fees.

The statute on taxation of costs, 28 U.S.C. § 1920, lists six items that may be taxed as costs:

(1) Fees of the clerk and marshal;

(2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

Under Federal Rule of Civil Procedure 54(d), "costs shall be allowed as of course to the prevailing party unless the court otherwise directs; . . . ." The Supreme Court has warned that "the discretion given district judges to tax costs should be sparingly exercised with reference to expenses not specifically allowed by statute." *Farmer* v. *Arabian American Oil Co.*, 379 U.S. 227, 235 (1964). With this frame of reference, we turn to the specific disallowed items.

1. *Deposition Costs*

For the costs of transcribing and copying six depositions, the plaintiffs requested reimbursement in the amount of $2,781.45. The district court excluded all deposition expenses from the costs taxed against Chris Craft.

Section 1920(2) permits taxation of costs for the "[f]ees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case."

Courts have generally held that the cost of taking and transcribing depositions fits within subsection 2. See *Allen* v. *United States Steel Corp.*, 665 F.2d 689, 697 (5th Cir. 1982); *Sun Ship, Inc.* v. *Lehman*, 655 F.2d 1311, 1318 n.48 (D.C. Cir. 1981); *Economics Laboratory, Inc.* v. *Donnolo*, 612 F.2d 405, 411 (9th Cir. 1979); *SCA Services, Inc.* v. *Lucky Stores*, 599 F.2d 178, 181 (7th Cir. 1979); *Keyes* v. *School District No. 1*, 439 F. Supp. 393, 417 (D. Colo. 1977).

Ramos v. *Lamm,* 713 F.2d 546, 560 (10th Cir. 1983). While some cases hold that the costs of depositions are taxable only if they were either introduced in evidence or used at trial, other cases allow the recovery of such costs if the taking of the depositions is shown to have been reasonably necessary in light of the particular situation at the time it was taken. *Copper Liquor, Inc.* v. *Adolph Coors Company,* 684 F.2d 1087, 1099 (5th Cir. 1982). *See generally* 6 J. Moore, W. Taggart & J. Wicker, Moore's Federal Practice § 54.77[4] (2d ed. 1985). We hold that if depositions are either introduced in evidence or used at trial, their costs should be taxable to the losing party. It is within the discretion of the district court to tax deposition costs if special circumstances warrant it, even though the depositions were not put in evidence or used at the trial.

In its order denying the deposition costs, the court stated: "None of the depositions taken were admitted in evidence at trial; therefore, they are not allowable costs." This is contrary to the record which shows that the six depositions for which plaintiffs seek costs were read into the record "in order to determine which parts will be read to the jury." Parts of two depositions were then read to the jury. We think it clear that all six depositions were introduced into evidence. Reading them into the record in order for the court to determine which parts could be read to the jury was in the nature of an offer of proof. The depositions read to the jury became, of course, part of the testimony of the case. The costs of the six depositions, $2,568.45, should, therefore, have been taxed to the defendant.

A subsidiary question is whether the expense of copying the depositions, $213.00, should be taxed as part of the deposition costs. The district court's order did not cover this. Section 1920(4) lists as a permissible taxable cost "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." In light of plaintiffs' unrefuted statement that in "introducing these depositions into the record it was neces-

sary to use the original and a copy of each transcript," the copying costs should also have been taxed to the defendant.

2. *Docket Fees*

Plaintiffs requested reimbursement for the docket fees of $15.00 $15.00 for the six depositions; this was also denied by the district court. Section 1920(5) allows taxation of docket fees under 28 U.S.C. § 1923. Section 1923(a) directs these costs to be taxed at "$2.50 for each deposition admitted into evidence." The docket fees of $15.00 must, therefore, be taxed to the defendant.

3. *Witness Fees*

Plaintiffs included in their bill of costs $6,975.15, the entire expense of retaining an expert witness for the litigation. The district court disallowed most of the amount requested, allowing only the standard statutory fee as prescribed under 28 U.S.C. § 1821 plus air fare to San Juan.

Section 1920(3) contains the statutory provision for taxing witnesses' fees as costs. Section 1821 specifies the amount of such fees. The long-standing rule is that the "federal statute governs." *Henkel* v. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 284 U.S. 444, 448 (1932). We have held that this rule applies in diversity cases. *Bosse* v. *Litton Unit Handling Systems, Division of Litton Systems, Inc.*, 646 F.2d 689, 695 (1st Cir. 1981). Thus, "[a]dditional amounts paid as compensation, or fees, to expert witnesses cannot be allowed or taxed as costs in cases in the Federal courts." *Pizarro-de-Ramirez* v. *Grecomar Shipping Agency*, 82 F.R.D. 327, 328 (D.P.R. 1975).

We recognize that the district court has some discretion in the taxation of costs for witnesses. *Farmer* v. *Arabian American*, 379 U.S. at 232. The rule in this circuit is: "Ordinarily the taxation of costs would be limited to those ordinary costs authorized by § 1920. Extraordinary costs may be allowed,

however, when specifically approved by the court prior to trial." *Gradmann & Holler GMBH* v. *Continental Lines, S.A.*, 679 F.2d 272, 274 (lst Cir. 1982). There was no such pretrial approval here. The district court's award of costs for plaintiffs' expert witness was in accord with the law and well within its discretion.

Attorney's Fees

Plaintiffs claim that they are entitled to $80,000 in attorney's fees under Rule 44.4(d) of the Puerto Rico Rules of Civil Procedure, because defendant's conduct was frivolous and obstinate. There are two reasons why this claim must be rejected, one legal and the other factual. We turn first to the law.

> Recognizing that the Puerto Rican statute and Rules of Procedure are part of the substantive law of the Commonwealth, we have allowed attorney's fees thereunder in diversity cases. *Pan American World Airways, Inc.* v. *Ramos*, 357 F.2d 341, 342 (lst Cir. 1966). The applicability of state statutes awarding attorney's fees and other expenses in diversity cases was established in *Cohen* v. *Beneficial Finance Corp.*, 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949). *But we have never extended the allowance of such costs arising under federal law.* We noted this in *Betancourt* v. *J. C. Penney Co., Inc.*, 554 F.2d 1206 (lst Cir. 1977): "The federal court in a diversity case *although not otherwise,* of course recognizes the Puerto Rican rule allowing attorney's fees to be awarded specially for obstinacy, . . ." (emphasis added). *See also Alicea Rosado* v. *Garcia Santiago*, 562 F.2d 114, 118 (lst Cir. 1977).

Sanabria v. *International Longshoremen's Association Local 1575*, 597 F.2d 312, 313-14 (lst Cir. 1979) (first emphasis added), *noted in* 6 Moore's Federal Practice § 54.77[2] at 143-44 (1984-1985 Supp). *Sanabria* controls here. This is not "a typical diversity case" in which the federal court would apply Puerto Rico substantive law. The law applicable was federal

admiralty law. *See Robinson* v. *Pocahontas, Inc.*, 477 F.2d 1048, 1052 (lst Cir. 1973); *Moore-McCormack Line, Inc.* v. *Amirault*, 202 F.2d 893, 896 (lst Cir. 1953). Plaintiffs have no legal basis for invoking Rule 44.4(d) of the Puerto Rico Rules of Civil Procedure.

Under admiralty law, a court has inherent power "to assess attorneys' fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Gradmann & Holler* v. *Continental*, 679 F.2d at 274 (quoting *F.D. Rich Co.* v. *United States ex rel. Industrial Lumber Co.*, 417 U.S. 116, 129 (1974)). Nothing in the record convinces us that an exercise of this "equitable power" is appropriate. While it is true that the litigation lasted for ten years, the record is replete with delays caused by both sides. Indeed, the plaintiffs' attorneys were reprimanded by the district court for "their failure to prosecute the case in a diligent and orderly manner." Some of the delay was caused by the untimely death of two former chief judges of the District Court of Puerto Rico, both of whom had been handling the case.

Summary

We affirm the district court's denial of prejudgment interest, expert witness fees and attorney's fees. We reverse as to deposition costs and docket fees. The amount of $2,796.45 must be taxed to the defendant.

Affirmed in part and reversed in part. Remanded.

No costs to either party on appeal.

"concurring follows"

Rubin, J., concurring:

In the First Circuit, a party's failure to object to a magistrate's recommendations with respect to both findings of fact and conclusions of law constitutes a waiver of the right to

contest those issues on appeal.[1] Accordingly, I concur. Other circuits, however, apply this waiver rule only to a magistrate's findings of fact.[2] It is my opinion that the latter construction of 28 U.S.C. § 636(b)(1) is the better. Therefore, had I the choice, I would reach the merits of appellants' claim that Michigan rather than admiralty law applies.

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[1] *Scott* v. *Schweiker*, 702 F.2d 13, 14 (1st Cir. 1983); *Park Motor Mart, Inc.* v. *Ford Motor Co.*, 616 F.2d 603, 605 (1st Cir. 1980); *accord United States* v. *Schronce*, 727 F.2d 91, 94 n.4 (4th Cir.), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2395, ____ L.Ed.2d ____ (1984); *United States* v. *Walters*, 638 F.2d 947, 949-50 (6th Cir. 1980); *cf. John B. Hull, Inc.* v. *Waterbury Petroleum Prods., Inc.*, 588 F.2d 24, 29-30 (2nd Cir. 1978), *cert. denied*, 440 U.S. 460, 99 S.Ct. 1502, 59 L.Ed.2d 773 (1979).

[2] *Britt* v. *Simi Valley Unified School Dist.*, 708 F.2d 452, 454-55 (9th Cir. 1983); *Nettles* v. *Wainwright*, 677 F.2d 404, 410 (5th Cir. 1982) (en banc) (Unit B); *accord Lorin Corp.* v. *Goto & Co.*, 700 F.2d 1202, 1206 (8th Cir. 1983); *see also United States* v. *Schronce*, 727 F.2d 91, 94-95 n.2 (4th Cir.) (Murnaghan, J., concurring), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2395, ____ L.Ed.2d ____ (1984).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

WILLIAM TEMPLEMAN, et al., *Plaintiffs,*	
v.	Civil No. 74-1238(RLA)
CHRIS CRAFT CORPORATION, *Defendant.*	

ORDER ADOPTING MAGISTRATE'S REPORT AND RECOMMENDATION

Absent opposition, the United States Magistrate's Report and Recommendation filed on January 27, 1984 is hereby approved and adopted.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 21st day of March, 1984.

/S/ Raymond L. Acosta
RAYMOND L. ACOSTA
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

WILLIAM TEMPLEMAN, et al.,
Plaintiffs,

v.

CHRIS CRAFT CORPORATION,
Defendant.

Civil No. 74-1238RA

MAGISTRATE'S REPORT AND RECOMMENDATION

Pursuant to Judge Acosta's order of past date, the undersigned hereby recommends that the substantive law applicable to this case should be general admiralty law including its choice of law rules. See generally: *Wendel* v. *Holland American Line,* 30 F.R.D. 162 (D.C. N.Y., 1961); *Pisacane* v. *Italian Line,* 1965 A.M.C. 2682; *Siegelman* v. *Cunard,* 1955 A.M.C. 1691.

The facts which give rise to this action have a strong maritime flavor. This forces the departure from the norm established in *Erie* v. *Tompkins,* 304 U.S. 64 (1938). That is, that a federal court acting upon its diversity of citizenship jurisdiction, as in the case at bar, should apply the choice of law rules of the forum as applied by the state courts. Briefly, this case is a claim against the manufacturers of a vessel by the owners and passengers of the same to recover damages resulting from the fire and sinking of the vessel approximately 20 miles east of San Juan, Puerto Rico. The claim is grounded on the theory of strict liability, negligence and breach of express and implied warranties.

Admiralty jurisdiction depends on the maritime nature of the event out of which the claim arises. See generally: *Strecfus Steamers* v. *Fox,* 14 F. Supp. 312 (D.C. W.Va., 1936). What is more, case law has generally applied admiralty law to alleged torts occurring in navigable waters of the United States or

within a state or in the high seas. See: *Weinstein* v. *Eastern Air Lines, Inc.*, 316 F. 2d 758 (3rd. Cir., 1963); *Penn Tanker Co.* v. *U.S.*, 409 F. 2d 514 (5th Cir., 1969). There are numerous cases where the courts have granted admiralty law over accidents involving pleasure boats. See generally: *American Eastern Development Corp.* v. *Everglades Marina, Inc.*, 608 F. 2d 123 (5th Cir., 1979); *Jacobs* v. *U.S.*, 1979 A.M.C. 660; *Oppen* v. *Aetna Ins. Co.*, 1973 A.M.C. 2165.

Admiralty jurisdiction has been extended to actions such as those involving contracts for vessel repairs, negligence of manufacturer for design of vessel; actions for products liability, claims for personal injury sustained in consequence of any defect in a vessel or in her apparel or equipment, and claims for recovery of indemnity or premiums on maritime insurance policies. See: *Benedict on Admiralty*, Volume 1, Section 106, 7th ed. See also, *Point Adamas Packing Co.* v. *Astoria Marine Construction Co.*, 594 F. 2d 763 (9th Cir., 1979); *McCraine* v. *Hondo Boats, Inc.*, 399 So. 2d 163 (La. 1981), cert. denied 458 U.S. 1105 (1982); *American Eastern Development Corp.* v. *Everglades Marina, Inc.*, supra; *Pan-Alaska Fisheries, Inc.* v. *Marine Construction & Design Co.* 565 F. 2d 1129 (9th Cir. 1977); *Maru* v. *Burmesteir & Wain*, 1982 A.M.C. 1320; *Feehan* v. *U.S. Lines*, 522 F. Supp. 811 (S.D. N.Y., 1980).

IT IS SO RECOMMENDED.

The parties are given ten (10) days from the date of this report to file objections, if any.

San Juan, Puerto Rico, January , 1984.

/S/ J.A. Castellanos
J. A. CASTELLANOS
United States Magistrate

28 U.S.C. § 636. Jurisdiction, powers and temporary assignment

* * *

(b)(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in Subparagraph (A), of applications for posttrial[3] relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.

Within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall made a de novo determination of those portions of

[3] So in original. Probably should be "post-trial."

the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate. The judge may also receive further evidence or recommit the matter to the magistrate with instructions.

28 U.S.C. § 636(b)(1) (1982).

RULE 72. Magistrates, Pretrial Matters

(a) Nondispositive Matters. A magistrate to whom a pretrial matter not dispositive of a claim or defense of a party is referred to hear and determine shall promptly conduct such proceedings as are required and when appropriate enter into the record a written order setting forth the disposition of the matter. The district judge to whom the case is assigned shall consider objections made by the parties, provided they are served and filed within 10 days after the entry of the order, and shall modify or set aside any portion of the magistrate's order found to be clearly erroneous or contrary to law.

(b) Dispositive Motions and Prisoner Petitions. A magistrate assigned without consent of the parties to hear a pretrial matter dispositive of a claim or defense of a party or a prisoner petition challenging the conditions of confinement shall promptly conduct such proceedings as are required. A record shall be made of all evidentiary proceedings before the magistrate, and a record may be made of such other proceedings as the magistrate deems necessary. The magistrate shall enter into the record a recommendation for disposition of the matter, including proposed findings of fact when appropriate. The clerk shall forthwith mail copies to all parties.

A party objecting to the recommended disposition of the matter shall promptly arrange for the transcription of the record, or portions of it as all parties may agree upon or the magistrate deems sufficient, unless the district judge otherwise directs. Within 10 days after being served with a copy of the

recommended disposition, a party may serve and file specific, written objections to the proposed findings and recommendations. A party may respond to another party's objections within 10 days after being served with a copy thereof. The district judge to whom the case is assigned shall made a de novo determination upon the record, or after additional evidence, of any portion of the magistrate's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommended decision, receive further evidence, or recommit the matter to the magistrate with instructions.

Fed. R. Civ. P. 72.